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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 501

FREDDIE LEE KINDELL, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner, Freddie Lee Kindell, prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in the above-entitled case on April 27, 1966, affirming the judgment of County Criminal Court at Law No. Two, Harris County, Texas, convicting Petitioner of the crime of negligent homicide in the second degree and sentencing him to three hundred sixty-six days in the County Jail of Harris County, Texas.

CITATIONS TO OPINIONS BELOW

The County Criminal Court rendered no written opinion. The opinion of the Texas Court of Criminal Appeals (R. 41), printed in Appendix B hereto, is reported in ____S.W.2d____.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on April 27, 1966. (R. 59). A timely petition for rehearing filed on May 11, 1966 (R. 45), was denied on June 1, 1966 (R. 59). Petitioner obtained substitution of counsel on May 30, 1966. Petitioner's application for stay of mandate was granted on June 3, 1966 (R. 59) to allow the filing of this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). The Petitioner contends that he has been deprived of his rights under the Constitution of the United States and that the validity of a State statute on grounds of repugnancy to a law of the United States is drawn in question.

QUESTIONS PRESENTED

(1) Does the conviction of the Petitioner of a criminal offense where the State fails to offer any evidence to prove an essential element of the offense violate his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

(2) Is the Petitioner's right to due process of law, as guaranteed by the Fourteenth Amendment of the United States Constitution, violated where the Petitioner's retained trial counsel but not the Petitioner objected to the introduction of the testimony of a State witness which shows the Petitioner to be not guilty?

(3) Does the conviction of the Petitioner under the Texas Negligent Homicide Statutes violate the due process clause of the United States Constitution

because the statutes fail to prescribe with reasonable certainty the elements of the offense?

(4) Does the punishment of a single non-willful negligent act by imprisonment for a year and a day constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution because it imposes a penalty disproportionate to the offense charged?

STATUTES INVOLVED

(1) This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States and the Eighth Amendment as applied through this Section.

(2) The statutory provisions involved are Tex. Pen. Code Ann. Arts. 1230-1243 (1961) and Tex. Rev. Civ. Stat. Ann. Art. 6701d (62) (1960). They are printed in Appendix A.

STATEMENT

On the night of October 12, 1964, while driving his father's 1961 Corvair automobile from a high school bonfire that he had been guarding, Petitioner was involved in a collision with a station wagon driven by David Knoll. Gary Keeling, a passenger in Petitioner's automobile, died as a result of this collision. Petitioner was eighteen years old at the time of the automobile collision. He had no previous convictions of any kind. He was not intoxicated or under the influence of any drugs. On January 26, 1965, Petitioner was charged by information with first and second degree negligent homicide in the death of Gary Keeling. (R. 2-5). The information and supporting affidavit charged as to second degree negligent homicide that

FREDDIE LEE KINDELL, the defendant, while driving a motor vehicle on a public road, was engaged in the performance of the unlawful act of driving his motor vehicle onto the left hand roadway of a public road which was then and there divided into two (2) roadways by a physical barrier, to-wit, an esplanade, at a place where there was no opening in said esplanade and where no crossover or intersection established by any public authority existed, and while so doing the defendant, without an apparent intention to kill the deceased but there being an apparent danger of causing the death of the deceased and other persons, caused the death of Gary Keeling, the deceased, by causing his motor vehicle to collide with another motor venicle, thereby killing the deceased, who was a passenger in the defendant's automobile, and the death of the deceased was caused by the defendant's acts of negligence and carelessness in failing to exercise that degree of care and caution as a person of ordinary prudence would have done under like circumstances in that he:

(1) drove his motor vehicle onto the left hand roadway of a public road which was then and there divided into two (2) roadways as herein above alleged.

(2) failed to guide his motor vehicle away from the said other motor vehicle;

(3) failed to keep a proper lookout for the said other motor vehicle, which motor vehicle he could have seen had he been looking in the direction he was going;

(4) failed to keep his motor vehicle under proper control by reason of its operation at a greater

rate of speed than was reasonable and prudent under the conditions then existing.

Against the peace and dignity of the State.

Petitioner's motion to quash the information on the ground that the allegations contained therein were too general to adequately inform him of the charge against him and on the further ground that the information incorrectly set out the description of the physical facts where the alleged offense occurred was denied. (R. 7). Petitioner duly excepted to this determination. (R. 8). The case was set for jury trial in County Criminal Court No. Two, Harris County, Texas on October 12, 1965. (R. 20).

Uncontroverted testimony adduced at the trial revealed the place of the collision to be a divided paved highway with two lanes for westbound traffic and two lanes for eastbound traffic. (S.F. 6, 7, 19-20, 33, 37). The highway dividing strip was not raised above street level and although there were no intersections established by public authority at this location, the shell strip was frequently used by automobiles coming from several bars and lounges on both sides of the highway for parking and crossing. (S.F. 21, 22, 37, 71, 72, 117). Uncontroverted testimony also revealed that prior to the collision Petitioner's automobile was proceeding in a westward direction in its proper lane. (S.F. 8, 101). An accident investigator testified for the prosecution that tire tracks made by Petitioner's automobile showed that his vehicle entered the dividing strip at a point where it was about four feet wide, traveled one hundred thirty-five feet down the strip, left it at a point where it was approximately ten feet wide, and then traveled another forty feet into the eastbound lane before colliding with the station wagon. (S.F. 60-61). A witness for the

prosecution who observed the collision from an automobile moving eastward from a point just west of the point of collision testified that the station wagon suddenly appeared in his left-hand lane a few seconds before the collision. (S.F. 39). The driver of this station wagon was first charged with murder by auto; the charge was later changed to driving while intoxicated. (S.F. 85, 89).

At the conclusion of the State's case, Petitioner moved for a directed verdict of not guilty on the ground that "the State . . . failed to prove as set out in the information that the road section at the point of the collision was divided by a physical barrier . . .," and hence that the State had failed to prove the specific unlawful act relied upon in the charge of second degree negligent homicide. (S.F. 78). Exception was duly taken to the overruling of this motion. (S.F. 79).

Testifying in his own behalf, Petitioner said that prior to the collision he was traveling west in an inside lane and that he turned left to avoid some lights "coming" toward him "across the esplanade." (S.F. 102). A witness for the State testified that the station wagon turned onto the highway or esplanade (he was not sure which) from a lounge to the north of the highway just seconds prior to the collision. (S.F. 131-33). He also testified that "the guy driving the station wagon wasn't looking or he would have put his brakes on . . ." (S.F. 133). But the entire testimony of this witness was excluded from the jury's consideration when objected to by Petitioner's trial counsel because of a violation of the rule allowing counsel to request the separation of witnesses to prevent one from hearing the testimony of another. (S.F. 134). The jury returned a verdict of guilty of second degree negligent homicide and assessed the penalty at three hundred sixty-six days in County Jail.

Petitioner's first and second amended Motions for New Trial maintained the objections taken to the form of the information in the motion to quash and further maintained that the physical conditions alleged in the information were not proved during the trial. (R. 26, 31). The motions were denied without opinion. (R. 38). Petitioner prosecuted his appeal to the Texas Court of Criminal Appeals insisting that his conviction without any evidence to support an essential element of the charge violated due process under the Fourteenth Amendment. The Texas Court of Criminal Appeals affirmed the conviction. (R. 41, 59); see Opinion Appendix B, *infra*. Petitioner's Motion for Rehearing was denied without written opinion June 1, 1966. (R. 45, 59). Petitioner obtained substitute counsel too late for a filing of supplemental briefs in the Texas Court of Criminal Appeals, but such counsel filed a Motion for Stay of Mandate which was granted June 3, 1966, to allow Petitioner to file his Application before this Court. (R. 55, 58, 59). The motion contended that the jury's verdict was based on such insufficient evidence as to effectively deprive the Petitioner of his right to a fair trial within the meaning of the "Due Process" clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. (R. 56). The Texas Court of Criminal Appeals is the highest State Court to which an appeal in a criminal case may be taken. Petitioner has thus exhausted his State remedies. (R. 59).

HOW FEDERAL QUESTIONS PRESENTED

To summarize how the federal questions involved in this petition were raised and preserved: Question No. 1 was first raised in trial counsel's motion for directed verdict and preserved by exception. This question was subse-

quently expressly decided against Petitioner by the Court of Criminal Appeals. Question No. 3 was raised by Petitioner's motion to quash the information. Exception was taken to the overruling of this motion. This exception was reiterated in the Motions for New Trial. Hence, it was properly preserved on appeal. Question Nos. 2 and 4 were not raised below. Petitioner contends that the Court should review these questions under its inherent power to "notice a plain error not assigned" (Rule 40 (i) (d) (2)) and for the additional reason that Petitioner (as distinguished from his trial counsel) did not knowingly consent to this waiver of his constitutional rights.

REASONS FOR GRANTING THE WRIT

I.

A criminal conviction secured without the production of any evidence proving an essential element of the charge of negligent homicide of the second degree violates the Petitioner's right to due process of law guaranteed by the Fourteenth Amendment and is in conflict with principles announced by this Court.

The holding below is in direct conflict with the principles announced by this Court in *Thompson v. City of Louisville*, 362 U.S. 199 (1960). In *Thompson*, this Court established as the law of the land a principle so fundamental to the entire basis of criminal law that such an authoritative statement would not seem necessary: it is a violation of due process "to convict and punish a person without evidence of his guilt." *Id.* at 206. The opinion in *Thomp-*

son was foreshadowed by many earlier decisions of this Court. See *Schwarr v. Board of Bar Examiners,* 353 U.S. 232 (1957); *United States ex rel. Vajtauer v. Commissioner of Immigration,* 273 U.S. 103 (1927); *Moore v. Dempsey,* 261 U.S. 86 (1923); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *cf. Akins v. Texas,* 325 U.S. 398, 402 (1945); *Tot v. United States,* 319 U.S. 463, 473 (1943) (Black and Douglass, JJ., concurring opinion); *Mooney v. Holohan,* 294 U.S. 103 (1935). Indeed, it is but the logical corollary of the principle that an accused is presumed innocent until proven guilty. See *Speiser v. Randall,* 357 U.S. 513 (1958) (Black and Douglas, JJ., concurring opinion).

The *Thompson* principle has been consistently applied by this Court to strike down State convictions where the record is barren of evidence to support essential elements of the charge made. *Barr v. Columbia,* 378 U.S. 146 (1964); *Taylor v. Louisiana,* 370 U.S. 154 (1962); *Garner v. Louisiana,* 368 U.S. 157 (1961); *cf. Wright v. Georgia,* 373 U.S. 284 (1963); *Peterson v. Greenville,* 373 U.S. 244 (1963) (concurring opinion). And the fact that the evidence may be sufficient to sustain a conviction on some other charge will not save the conviction (*Garner v. Louisiana, supra* at 164) because to convict one upon a charge not made likewise violates due process. *Garner v. Louisiana, supra; Thompson v. City of Louisville,* 362 U.S. 199, 206 (1960); *cf. Cole v. Arkansas,* 333 U.S. 196, 201 (1948); see *Winters v. New York,* 333 U.S. 507 (1948); *Musser v. Utah,* 333 U.S. 95 (1948); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939). This Court in *Garner* explained the principle thusly: "[W]e cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to

send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support the conviction." *Garner v. Louisiana, supra.*

A conviction of negligent homicide of the second degree under Texas Negligent Homicide Statutes requires the proof of three essential elements beyond a reasonable doubt: (1) The homicide must have occurred during the performance of an unlawful act; (2) the homicide must have occurred under circumstances with apparent danger of causing the death of the person killed or some other person, and (3) the homicide must have been the consequence of the act done or attempted to be done. *Howard v. State,* 25 Tex. Crim. 686, 8 S.W. 929 (1888); *McConnell v. State,* 22 Tex. Crim. 354, 3 S.W. 699 (1887). The information under which Petitioner was charged, tried, and convicted charges him with having committed the homicide while "engaged in the performance of an unlawful act of driving his motor vehicle onto the left hand roadway of a public road which was then and there divided into two (2) roadways by a physical barrier, to wit, an esplanade . . ." (R. 10). See Tex. Rev. Civ. Stat. Ann. art. 6701d (62) (1960), printed in Appendix A, *infra,* for a full text of the unlawful act as defined by statute. But the evidence presented by the State wholly failed to prove the existence of any actual physical barrier or impediment to traffic. In fact, all the evidence produced at the trial disproves entirely the existence of an actual physical barrier or impediment to traffic. See S.F. 21, 22, 37, 71, 72, 117. Hence the specific unlawful act relied upon by the State in its charge of second degree negligence homicide was never supported by *any* evidence and the Petitioner was convicted upon a fatally deficient record. The fact that the evidence pre-

sented may have established the offense of first degree negligent homicide cannot justify a conviction of second degree negligent homicide. *Garner v. Louisiana*, 368 U.S. 157, 164 (1961).

The Texas Court of Criminal Appeals avoided deciding the constitutional issue by resting its decision upon statutory construction. Construing the term "physical barrier" for the first time, the Court concluded that any "limit or boundary" is a "physical barrier" within the meaning of the unlawful act charged (R. 43). Substantial federal rights will not be allowed to turn on a misconstruction. *Napue v. Illinois*, 360 U.S. 264, 271, 272 (1959); See *Spano v. New York*, 360 U.S. 315, 316 (1959); cases cited in *Napue v. Illinois, supra* at 272 n.4; *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Norris v. Alabama*, 294 U.S. 587 (1935). This Court has recognized that when it reviews a conviction of crime, regard for the fundamental elements of due process requires it to base its judgment upon the "whole course of the proceedings" in order to determine whether they 'offend those canons of decency and fairness which express the notions of justice of English-speaking peoples . . .' *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting from *Malinski v. New York*, 324 U.S. 416, 417 (1945)).

Texas courts have consistently required the State to prove alleged unlawful acts in the same detail that they are alleged. *Goodwin v. State*, 320 S.W.2d 852 (1959); *Easley v. State*, 319 S.W.2d 325 (1959); *Malone v. State*, _____Tex. Crim._____, 117 S.W.2d 779 (1938); *Jacobs v. State*, 91 S.W.2d 348 (1936); *Spencer v. State*, 42 S.W.2d 259 (1930). While this may be only a local rule of practice in the normal case, the proscriptive

protection of due process attaches when that detail to be proved is an essential element of an offense. It is the burden of the prosecution to prove the existence of every element of the crime charged. See 20 Am. Jur., Evidence §149 (1939). Here, as in *Thompson* and *Garner*, the prosecution has not faithfully carried that burden.

II.

A criminal conviction which is caused by the Petitioner's retained counsel objecting to the introduction of the testimony of a State witness which shows the Petitioner to be not guilty violates Petitioner's right to due process of law guaranteed by the Fourteenth Amendment and is in conflict with principles announced by this Court.

Petitioner is not here asserting a violation of due process because of incompetency of counsel. Admittedly, counsel of Defendant's own choosing is not chargeable with such incompetency as "to make a farce and mockery of justice" for honest mistakes made in the exercise of the attorney's best judgment during the course of trial. *Davis v. Bomar*, 344 F.2d 84, 88 (6th Cir. 1965); *Pineda v. Bailey*, 340 F.2d 162 (5th Cir. 1965); *Popeko v. United States*, 294 F.2d 168 (5th Cir. 1961). But, Petitioner earnestly asserts that a young, inexperienced Defendant, unfamiliar with the law, may not be held to have effectively waived his constitutional right to a fair trial by imputing to the Defendant an unreasoned decision of his attorney to object to particular testimony, made without any consultation with the Defendant. *Cf. Brookhart v. Janis*, 384 U.S. 1 (1966); *Henry v. Mississippi*, 379 U.S. 443 (1965); see

Fay v. Noia, 372 U.S. 391 (1963). Such fictional imputation coupled with a State procedure requiring that a federal question be timely raised or be considered waived effectively cuts off the right of Petitioner to assert a real and substantial federal right in the State courts. The federal habeas corpus jurisdiction is of little aid because of the overloaded dockets in Houston. Petitioner will serve his entire sentence before his application for a writ can be considered. A decision on his asserted denial of a federal right will then virtually be rendered moot.

This Court has often held that blind adherence to procedural formalities will not be allowed to prevail over a real and substantial federal right. *Gould v. United States*, 255 U.S. 298 (1921). It has maintained that a waiver of constitutional rights will not be lightly inferred. *Smith v. United States*, 337 U.S. 137, 150 (1949); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 395 (1937); *Ohio Bell Tel. Co. v. Commission*, 301 U.S. 292, 306 (1937); *Hodges v. Easton*, 106 U.S. 408, 412 (1882). And courts indulge every reasonable presumption against such a waiver. *Emspak v. United States*, 349 U.S. 190 (1955); *Smith v. United States, supra; Glasser v. United States*, 315 U.S. 60, 70-71 (1942); *Johnson v. Zerbst, supra.*

In two recent decisions, this Court has indicated that a decision of counsel resulting in a waiver of a Defendant's constitutional right will not be imputed to Defendant absent a showing that Defendant "knowingly consented" to the decision resulting in such waiver. In *Brookhart v. Janis*, 384 U.S. 1, 7 (1966), this Court said:

> "The record shows, however, that Petitioner himself did not intelligently and *knowingly agree* to be tried

> in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him . . . Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a Defendant cannot be waived by his counsel under such circumstances. (Emphasis added.)

And in *Henry v. Mississippi*, 379 U.S. 443, 451 (1965), this Court reaffirmed that "trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims . . ." A fortiorari, it would seem that the momentary whim of inexperienced counsel should not so bind the Defendant.

The question of waiver of a constitutional right may always be determined anew in federal court. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); see *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Blackburn v. Alabama*, 361 U.S. 199, 205 n.5 (1960). Exactly when the "circumstances are exceptional" enough that the trial strategy or mistakes of counsel will not be binding on accused is a matter for the exclusive determination of this Court.

The testimony of Mr. Tindle, objected to by Petitioner's trial counsel on the basis of a violation of Rule 644 of the Texas Code of Criminal Procedure, which provides for the separation of witnesses, tended to wholly negate any negligence on the part of Petitioner and at the same time to corroborate his statement that he was momentarily blinded by the headlights of an automobile on an apparent

collision course. See S.F. 131-34. This witness was the only person who viewed the entire occurrence from a stationary position and who was able to testify as to where and how the station wagon appeared on the highway. His testimony was critical to Petitioner's case. The objection of Petitioner's trial counsel on the basis of the separation of witnesses rule was probably nothing more nor less than the automatic response of an attorney conditioned to a civil practice. While it is clear that this Court will not redetermine an issue of "sufficiency of the evidence" as opposed to an issue of "no evidence" (*Hoag v. New Jersey*, 356 U.S. 464 (1958)), Petitioner respectfully asserts that Mr. Tindle's unique view of the collision places his testimony in a so much better position than the mere hypotheses of the other witnesses that it gives rise to substantially a "no evidence" question. This Court's recent pronouncements condemning a conviction obtained upon a record barren of evidence to sustain essential elements of the offense discussed under question one above are hence equally applicable here. See *Garner v. Louisiana*, 368 U.S. 157, 164 (1961); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960). Testimony of all the other witnesses as to how the station wagon appeared on the highway was little more than surmise. Without the excluded testimony, the scene was not complete—neither negligence nor lack of negligence was clearly established. Petitioner was in effect convicted without any probative evidence adduced on the essential element of negligence.

The fact that Petitioner did not realize the error of his counsel at the time of its making should not preclude his now raising it in view of Rule 40 (1) (d) (2), which allows this Court to notice plain error whether or not it has been properly raised, and although it is neither assigned nor

specified. *Silber v. United States,* 370 U.S. 717 (1962); *United Brotherhood of Carpenters v. United States,* 330 U.S. 395 (1947); *United States v. Atkinson,* 297 U.S. 157 (1936). As a result of the exclusion of this essential testimony, Petitioner's case was presented to the jury in a completely distorted manner and his conviction was secured without that fundamental fairness essential to any concept of justice. *Payne v. Arkansas,* 356 U.S. 560 (1958).

III.

Petitioner was convicted of a crime under the provisions of a State statute which is so vague, indefinite, and uncertain as to offend the due process clause of the Fourteenth Amendment as construed by applicable decisions of this Court.

The information filed in this case charges that Petitioner,

> while driving a motor vehicle on a public road, was engaged in the performance of the unlawful act of driving his motor vehicle onto the left-hand roadway of a public road which was then and there divided into (2) roadways by a physical barrier, to-wit, an esplanade, at a place where there was no opening in said esplanade and where no crossover or intersection established by any public authority existed, and while so doing the [Petitioner], without apparent intention to kill the deceased but there being an apparent danger of causing the death of the deceased and other persons, caused the death of Gary Keeling, the deceased, by causing his motor vehicle to collide with another motor vehicle, thereby killing the deceased, who was a passenger in the Defendant's automobile, and the

death of the deceased was caused by the [Petitioner's] acts of negligence and carelessness in failing to exercise that degree of care and caution as a person of ordinary prudence would have done under like circumstances in that he:

(1) drove his motor vehicle onto the left-hand roadway of a public road which was then and there divided into two (2) roadways as hereinabove alleged;

(2) failed to guide his motor vehicle away from the said other motor vehicle;

(3) failed to keep a proper lookout for the said other motor vehicle, which motor vehicle he could have seen had he been looking in the direction he was going;

(4) failed to keep his motor vehicle under proper control by reason of its operation at a greater rate of speed than was reasonable and prudent under the conditions then existing. (R. 10).

Aside from the specific factual allegations, this was a charge essentially in the terminology of the Texas negligent homicide statutes. The pertinent provisions of the statutes are printed in Appendix A *infra*. Since the information charges a homocide committed during the performance of an unlawful act, it charges negligent homicide of the second degree. The evident failure of the State to prove the specific unlawful act relied upon in the charge has been discussed in the preceding section of this petition. But an even greater danger to the constitutional guarantees of due process lurks in the terminology of the statutes themselves.

The standard of culpability required by the statutes is simple negligence. *Haynes v. State,* 88 Tex. Crim. 42, 224 S.W. 1100 (1920). No intent, willfullness, or even knowledge and appreciation of the danger need be shown. The element of "apparent danger of causing death" would at first blush suggest a measure of criminality at least equivalent to recklessness, but the Texas courts have not so interpreted it. Whether there is apparent danger of causing death is determined from the facts as a whole, rather than from the viewpoint of the accused alone. *Espinoza v. State,* 160 Tex. Crim. 515, 272 S.W.2d 728 (1954); *Johnson v. State,* 156 Tex. Crim. 23, 238 S.W.2d 766 (1951); *Vasquez v. State,* 121 Tex. Crim. 478, 52 S.W.2d 1056 (1932). In effect, the accused is told for the first time at his trial that he "should have known" that there was an apparent danger of causing death. This may be a sufficient standard to use for civil liability but it falls far short of that traditionally required in penal legislation. The standard of certainty in penal statutes is higher than in those depending on the civil law for enforcement. *Winters v. New York,* 333 U.S. 507 (1948). Criminal statutes must provide an ascertainable standard of guilt. *Williams v. United States,* 341 U.S. 97 (1951); *Winters v. New York, supra; Musser v. Utah,* 333 U.S. 95 (1948); *Herndon v. Lowry,* 301 U.S. 242 (1937); *Clim v. Funk Dairy Co.,* 274 U.S. 445 (1927). Their terms must be sufficiently explicit to inform those subject to them of the proscribed conduct. *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337 (1952); *Musser v. Utah, supra; United States v. Sullivan,* 332 U.S. 689 (1948); *Gorin v. United States,* 312 U.S. 19 (1941); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939); *Herndon v. Lowry,* 301 U.S. 242 (1937); *Champlin Ref. Co. v. Corporation Comm'n,* 286 U.S. 210 (1932); *Whitney v. California,* 274 U.S. 357 (1927);

Connally v. General Constr. Co., 269 U.S. 385 (1926); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81 (1921). The fact that a statute restricts punishment to acts done "knowingly" or that it requires a specific interest has been given weight by this Court in rejecting due process objections made on the basis of vagueness. See *Communications Assoc. CIO v. Douds*, 339 U.S. 382 (1950); *Screws v. United States*, 325 U.S. 91 (1945); *United States v. Ragen*, 314 U.S. 513 (1942); *Gorin v. United States, supra*; *Omaechevarria v. Idaho*, 246 U.S. 343 (1918). Punishment under the Texas Negligent Homicide Statutes is not so restricted. Specification of the details of an offense established by a void statute will not serve to validate it because the statute, not the specific accusation under it, prescribes the offense and must give the warning. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Hence the particularity of the allegations in the present information will not save the conviction if the statute is invalid on its face.

Of course, State courts are primarily charged with the responsibility of protecting persons from conviction under a vague State statute. *Winters v. New York*, 333 U.S. 507 (1948). But the statutes defining first degree negligent homicide were held valid against a vagueness objection in *Pehl v. State*, 153 Tex. Crim. 553, 223 S.W.2d 238 (1949). And the statutes defining second degree negligent homicide were likewise upheld in *Dunn v. State* 390 S.W.2d 775 (Tex. Crim. App. 1965). Neither opinion gave the objection more than cursory notice. Yet Texas courts have been scrupulous to require a clear-cut standard in statutes making negligent activity a crime when no death is involved. In *Ex parte Chernosky*, 153 Tex. Crim. 52, 217 S.W.2d 673 (1949), Texas struck down as too vague and indefinite a reckless driving statute which provided that every "per-

son who drives any vehicle in willful or wanton disregard of the rights or safety of others or without due caution or circumspection, and at a speed or in a manner so as to endanger or be likely to endanger a person or property shall be guilty of reckless driving." *Id.* at 53, 217 S.W.2d at 673. The Texas court said that criminal prosecutions for mere negligent acts have not been authorized, because of the requirement of definiteness in criminal statutes. *Id.* at 54-55, 217 S.W.2d at 674. In *Brown v. State,* 103 Tex. Crim. 35, 279 S.W. 837 (1926), the Texas Court of Criminal Appeals, while reversing a negligent homicide conviction on an evidence point, suggested that an act declaring that a person operating a vehicle shall do so in a careful and prudent manner and making the violation of such provision a misdemeanor, was probably too vague and indefinite to comply with the law requiring a degree of certainty in the definition of offenses. See also *Ladd v. State,* 115 Tex. Crim. 355, 27 S.W.2d 1098 (1930); *Snider v. State,* 89 Tex. Crim. 192, 230 S.W. 146 (1921); *Russell v. State,* 88 Tex. Crim. 512, 228 S.W. 566 (1921); *Griffin v. State,* 86 Tex. Crim. 498, 218 S.W. 494 (1920). The "reasonable and prudent man" standard cannot be too vague and indefinite when applied to punish minor infractions of traffic laws and suddenly become sufficiently definite when applied to the same conduct resulting in a death. If anything, the law should be more closely scrutinized when the punishment to be inflicted is more severe.

If the Defendant is charged, in the language of this statute, with careless or negligent driving, whether he was careless or negligent depends upon the judgment of the jury. The fixed standard of conduct that tells one whether he is violating the law or not at any particular time is missing. "This yardstick is so ductile as to be easily elongated to include acts innocent in themselves or compressed to

exclude most culpable conduct . . . Defendant's conduct is measured by the flexible discretion of the court or jury . . . Unpopular defendants may be convicted and popular defendants acquitted for identical acts." *People v. Maki*, 245 Mich. 455, 223 N.W. 70, 78 (1929); See *State v. Lontz*, 90 W. Va. 738, 11 S.E. 766 (1922); *Howard v. State*, 151 Ga. 845, 108 S.E. 513 (1921); *Hayes v. State*, 11 Ga. App. 371, 75 S.E. 523 (1912). Reposing the standard of guilt or innocence "in the varying conscience of jurors who are to conduct the inquiry ex post facto," cannot purport to meet the legitimate ends of the criminal law and the essential requirements of due process. *United States v. Bernstein*, 267 Fed. 295 (D. Neb. 1920).

IV.

The punishment of a single negligent act by a criminal penalty encompassing imprisonment constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments because it imposes a penalty disproportionate to the offense charged.

Petitioner has been sentenced to three hundred sixty-six days in County Jail. (R. 20). If he is guilty of a crime at all, it is only ordinary negligence. On first impression, this sentence may not seem "cruel or unusual" in the conventional sense of the term. But the standard for determining whether a particular punishment is cruel and unusual must be based upon "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The sentence was not attacked below on the basis of cruel and unusual punishment but this

Court may nevertheless review this question because of its inherent power under Rule 40(1)(d)(2). See *Weems v. United States,* 217 U.S. 349 (1910) where this Court reversed on the basis of cruel and unusual punishment although the question was not timely raised.

The earliest conception of the cruel and unusual punishment prohibition employed by the courts of this country was limited to those inhuman and barbarous methods common to the administration of the English criminal law. See Story, *A Familiar Exposition of the Constitution of the United States* 238-39 (1859). But it is now well established that the term means more than this. The prohibition is directed not only at those punishments which are inherently cruel but also at those punishments which are disproportionate to the offense charged. *Robinson v. California,* 370 U.S. 660 (1962); *Weems v. United States,* 217 U.S. 349 (1910); see *Rudolph v. Alabama,* No. 308 Misc., *cert. denied* 375 U.S. 889 (1963) (Goldberg, Douglas, and Brennan, JJ. dissenting). In determining whether a particular punishment is excessive, this Court may review the extent to which the State's interest in accomplishing the objectives of the criminal law in the case at hand permits it to deprive the accused of life, liberty, or property. *Robinson v. California, supra* at 668 (Douglas, J. concurring); see *Rudolph v. Alabama, supra. Robinson* once again makes evident that the criminal law is intended primarily to apply to *voluntary* acts. And Mr. Justice Stewart's statement in *Robinson* that addiction may "innocently result from the use of medically prescribed narcotics" indicates that the definition of a crime must provide for a minimal content of mens rea. *Robinson v. California, supra* at 667 n. 9; see Note, 16 STAN. L. REV. 996, 1009 (1964). The decisions of this Court in *Morissette*

v. United States, 342 U.S. 246 (1952) and *Lambert v. California*, 355 U.S. 225 (1957) also lay emphasis upon the mens rea requirement.

The essence of mens rea is awareness of the risk or danger. See *Morissette v. United States*, 342 U.S. 246 (1952). A conviction under the automobile homicide statutes of most states requires a showing that a risk was consciously taken. See Note, 44 IOWA L. REV. 558 (1959). Whether the standard be phrased "willfulness," "recklessness," or some other term, it is clear that the inadvertent harm-doer who is guilty of only ordinary negligence is excluded. *Ibid.* Texas is in a distinct minority in allowing a conviction on a showing of only ordinary negligence.

Automobile homicide statutes are a relatively new legislative development. The first motor vehicle homicide statute was enacted by Michigan in 1921. Mich. Acts 1921, No. 98. Now the majority of states have such statutes. Note, 44 IOWA L. REV. 558 n. 2 (1959). The Texas negligent homicide statutes is but a variation of these. Almost without exception, the states enacting such legislation have given due deference to the common-law background of manslaughter and have retained a requirement of criminal culpability greater than ordinary negligence. Note, 44 IOWA L. REV. 558, 565 (1959). Even though the obvious purpose of these statutes was to deter and condemn the actions of those contributing to growing highway death rates, the implicit legislative determination in the statutes enacted is that no legitimate end of the criminal law may be served by convicting "drivers for regrettable chance casualties arising from unexpected contingencies, involving no knowledge on the part of the accused, no choice of conduct to be observed to avoid such dire consequences." *People v. Maki*, 245 Mich. 455, 223 N.W. 70, 80 (1929).

Several scholars have observed that punishment for negligent conduct fails to deter, *i.e.*, it fails to accomplish the primary purpose of punishment. Hall, *General Principles of Criminal Law* 137 (1960); Williams, *Criminal Law: The General Part* 122-23 (1961). The Texas negligent homicide statutes viewed in the perspective of other similar legislation and the historical context out of which such legislation has evolved clearly demonstrates lack of a rational relationship between the offense and the nature of the punishment. Whether the permissible arms of criminal punishment are so subverted by these statutes that any criminal penalty imposed on ordinary negligence is excessive is a serious question deserving the attention of this Court.

Traffic deaths have become a matter of growing national concern. New legislation directed at reducing such deaths is in prospect. See Address by Joseph Kelner, American Trial Lawyers Assoc. 20th Nat'l Convention, 1966. Legislators must be made aware of the danger to individual rights lurking in statutes so loosely drawn that the state need prove little more than causation.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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JERALD DAVID MIZE
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Date: 8-26-66

APPENDIX A

STATUTES

Tex. Rev. Civ. Stat. Ann. Art. 6701d (62) (1960):

Whenever any highway has been divided into two (2) roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway and no vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a cross-over or intersection established by public authority.

Tex. Pen. Code Ann. Arts. 1230-1243 (1961):

Article 1230—Two kinds

Homicide by negligence is of two kinds:

1. Such as happens in the performance of a lawful act; and
2. That which occurs in the performance of an unlawful act.

Article 1231—In first degree

Whoever in the performance of a lawful act shall by negligence and carelessness cause the death of another is guilty of negligent homicide of the first degree. A lawful act is one not forbidden by the penal law and which would give no just occasion for a civil action.

Article 1232—Must be apparent danger of causing death

To constitute this offense, there must be an apparent danger of causing the death of the person killed or some other.

Article 1233—How distinguished from excusable homicide

The want of proper care and caution distinguishes this offense from excusable homicide. The degree of

care and caution is such as a man of ordinary prudence would use under like circumstances.

Article 1234—Examples

Throwing timbers by a workman from the roof or upper part of the house in a public street or highway, or where a number of persons are known to be around the house, or discharging firearms on or near a public highway other than a street in a town or city in such manner as would be likely to injure persons who might be passing, are examples of negligent homicide of the first degree, in case of death resulting therefrom. If death is caused by the careless discharge of firearms in a public street of a town or city, the offense will be of a higher degree.

Article 1235—No apparent intention to kill

To bring the offense within the definition of negligent homicide either of the first or second degree, there must be no apparent intention to kill.

Article 1236—Must be consequence of the act

The homicide must be the consequence of the act done or attempted to be done.

Article 1237—Punishment

Negligent homicide of the first degree shall be punished by confinement in jail not exceeding one year, or by fine not exceeding one thousand dollars.

Article 1238—Previous rules apply to second degree

The definitions, rules and provisions of the preceding articles of this chapter, with respect to negligent homicide of the first degree, apply also to the offense of negligent homicide of the second degree, or such as is committed in the prosecution of an unlawful act, except when contrary to the following provisions.

Article 1239—Only committed, when

Negligent homicide of the second degree can only be committed when the person guilty thereof is in the act of committing or attempting the commission of an unlawful act.

Article 1240—"Unlawful act"

Within the meaning of an "unlawful act" as used in this chapter are included:

(1) Such acts as by the penal law are called misdemeanors; and

(2) Such acts, not being penal offenses, as would give just occasion for a civil action.

Article 1241—If intent is to commit a felony

When one in the execution of or in attempting to execute an act made a felony by law shall kill another, though without an apparent intention to kill, the offense does not come within the definition of negligent homicide.

Article 1242—In attempt at misdemeanor

When the unlawful act attempted or executed is known as a misdemeanor, the punishment of negligent homicide committed in the execution of such unlawful act shall be imprisonment in jail not exceeding three years, or by fine not exceeding three thousand dollars.

Article 1243—Punishment

If the act intended is one for which an action would lie, but not an offense against the penal law, the homicide resulting therefrom is a misdemeanor, and may be punished by fine not exceeding one thousand dollars, and by imprisonment in jail not exceeding one year.

APPENDIX B

Freddie Lee Kindell, Appellant

No. 39,527 v. ---Appeal from Harris County

The State of Texas, Appellee

OPINION

The conviction is far negligent homicide in the second degree; the punishment, three hundred sixty-six days in jail.

The seond count of the information, under which appellant was convicted, charged that while engaged in the performance of an unlawful act "of driving his motor vehicle onto the left hand roadway of a public road which was then and there divided into two (2) roadways by a physical barrier, to-wit, an esplanade, at a place where there was no opening in said esplanade and where no crossover or intersection established by any public authority existed," the appellant did by negligence and carelessness cause the death of Gary Keeling by causing his (appellant's) motor vehicle to collide with another vehicle, thereby killing the deceased, who was a passenger in appellant's automobile.

It was undisputed that the deceased was killed in a collision between a 1961 Corvair automobile driven by appellant and a 1955 Ford station wagon driven by one David Knoll. At the time of the collision the deceased was riding as a passenger in appellant's automobile. The collision occurred in the 12,200 block of Market Street Road, in Harris County.

At the site of the collision, Market Street Road was a divided paved highway with two lanes for westbound traffic

and two lanes for eastbound traffic. A shell espanade divided the highway into the two roadways. At such location there were no crossroads or intersections.

It was shown by the testimony of the state's witnesses that prior to the collision the appellant was traveling west on Market Street and the Ford station wagon was traveling east. As both vehicles were proceeding in opposite directions in their proper traffic lanes, appellant's automobile crossed over the esplanade into the roadway for eastbound traffic and collided with the station wagon. One witness to the collision estimated the speed of appellant's automobile at sixty miles per hour. The point of impact between the two vehicles was approximately in the center of the roadway for eastbound traffic. Tire marks made by appellant's automobile showed that his vehicle entered the esplanade at a point where it was about four feet wide, traveled one hundred thirty-five feet down the esplanade, leaving it at point where it was almost ten feet wide, and then traveled another forty feet into the eastbound traffic lane before colliding with the oncoming automobile.

Testifying in his own behalf appellant stated that prior to the collision he was traveling west in an inside lane and when he saw some lights "coming" toward him "across the esplanade," he turned left and did not remember anything else until after the collision.

The jury, by their verdict, found appellant guilty as charged.

Appellant insists that the evidence is insufficient to support the conviction because the state failed to prove that at the place of the collision the highway was divided into two roadways by a "physical barrier, to-wit, an esplanade," as charged in the information.

Appellant insists that the non-paved section, covered with shell, between the two roadways was not a physical barrier and he points to certain testimony in the record which showed that, on occasions, persons did drive across the esplanade and park cars thereon.

The unlawful act charged in the information is defined in Sec. 62 of Art. 6701d, V.C.S., as follows:

> "Whenever any highway has been divided into two (2) roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway and no vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection established by public authority."

It appears that no court has construed the meaning of a "physical barrier," as such term is used in the statute.

Two of the civil courts of this state have held that solid yellow lines in the center of a highway constitute an "intervening space" or "dividing section" within the meaning of Sec. 62 of the statute. Mrs. Baird's Bakeries, Inc. v. Roberts (Civ.App., 1962), 360 S.W.2d 850, ref., n.r.e.; Boggus v. Miller (Civ.App., 1965), 388 S.W.2d 240, ref., n.r.e.

While an esplanade like the one in question is not a physical barrier such as a fence or other obstacle, it is a barrier within the definition found in Webster's New International Dictionary: "Any limit or boundary; a line of separation."

The unlawful act charged under the statute was the driving of a motor vehicle onto the lefthand roadway of a divided highway at a place where there was no opening or crossover or intersection established by any public authority.

The allegation that the highway was divided by a "physical barrier" rather than "an intervening space" or "dividing section" did not require proof that the esplanade was an impassable obstruction.

We hold the evidence sufficient to sustain the allegations of the information.

Appellant's remaining contention is that the court erred in refusing to grant him a new trial because of alleged jury misconduct.

The contention is not presented by either a formal or informal bill of exception. The juror's affidavit which was attached to the motion for new trial does not prove itself and cannot be substituted for a bill of exception. Flores v. State, 352 S.W.2d 852; Perez v. State, 396 S.W.2d 870. Nothing is presented for review.

The judgment is affirmed.

DICE, Judge.

(Delivered April 27, 1966)

Opinion approved by the court.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Writ of Certiorari was deposited in the United States mail on the 24th day of August, 1966, addressed to The Honorable Hawthorne Phillips, First Assistant Attorney General of Texas, Capitol Station, Austin, Texas.

William E. Ladin
Counsel for Petitioner

Jerald David Mize
Counsel for Petitioner